Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

JOSEPHINE CHIMBLO AND ESTATE OF
ANTHONY J. CHIMBLO, Deceased,
ROSALIE MONAHAN, Executrix,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the TEFRA system of the Internal Revenue Code governing the federal income taxation of partnerships and partners, requires a partner against whom a notice of deficiency is issued at the partner-level for personal liability for penalties, to engage in multiple litigation and split her defenses to that single deficiency notice into two lawsuits: (1) First: the partner has to engage in a partnership-level lawsuit in which she is prohibited from defending her personal liability on the merits but must raise the statute of limitations defense or lose it; and (2) Secondly: she then must engage in a partner-level lawsuit in which a defense on the merits is permitted but not the statute of limitations defense to the same deficiency notice?

2. Did the TEFRA construction of the Court of Appeals create an impermissible exception to Internal Revenue Code § 6213, which authorizes a total defense to a notice of deficiency, by ruling that the partner was not permitted to assert the statute of limitations defense in response to the deficiency notice asserting personal liability for penalties?

3. Was the Court of Appeals required to rule on claims of constitutional violations of equal protection and due process caused by its construction of the TEFRA system?

4. In sustaining the penalties on the basis of the single factor of the taxpayer's reliance on an advisor whom the Court deemed not qualified, and in disregarding all other applicable circumstances including the IRS concession that the operative partnership investment was not tax-motivated, was the decision below in conflict with *U. S. v. Boyle*, 469 U.S. 241 (1986) and other federal courts?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Josephine Chimblo and the Estate of Anthony J. Chimblo, her deceased husband, and the Commissioner of Internal Revenue. Catherine Chimblo and the Estate of Gus Chimblo, parties below, are not parties to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Josephine Chimblo and the Estate of Anthony J. Chimblo, deceased, acting by its executrix, Rosalie Monahan, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Josephine Chimblo, Estate of Anthony J. Chimblo, Deceased, Rosalie Monahan, Executrix v. Commissioner of Internal Revenue,*

177 F.3d 119 (2d Cir. 1999), petition for rehearing denied August 19, 1999. The memorandum opinion of the United States Tax Court is not officially reported but appears at *Chimblo v. Commissioner*, 74 T.C.M. (CCH) 1307 (1997). Both opinions are included in Petitioners' Appendix (App.) 1a, 17a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 17, 1999. A petition for rehearing was denied on August 19, 1999. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the fifth amendment to the United States Constitution provides: "nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *." This provision includes a standard of equal protection under the law which "is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

Relevant portions of the Internal Revenue Code ("Code") are set forth in Petitioners' Appendix, 31a, consisting of Code § 6213 and certain of the TEFRA provisions.

STATEMENT OF THE CASE

Two fundamental areas of question are presented by this case.

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[1] TEFRA is the acronym for the Tax Equity and Fiscal Responsibility Act, Pub. L. No. 97-248, 6, 402(a), 96 Stat. 324, adding §§ 6221 through 6231 of the Internal Revenue Code.

(1) The first concerns the operation of the TEFRA system of the Code and its effect on federal income tax litigation, particularly with respect to litigation against an Internal Revenue Service ("IRS") notice of deficiency to a partner limited to her non-partnership personal items.

The Court of Appeals held that the TEFRA system of the Code prohibits a partner from asserting the defense of the statute of limitations against the deficiency notice for tax penalties in the same lawsuit in which she defends against the same deficiency notice on the merits, even though the deficiency notice involved only non-partnership items, with the result of requiring the taxpayer to split her defense and become involved in two lawsuits in order to defend against the same deficiency notice. The Court of Appeals construction of TEFRA is inconsistent with Code § 6213, governing appeals from a deficiency notice and which permits all defenses against the same deficiency notice to be asserted in a single suit. The taxpayer claims that the Court of Appeals construction is erroneous and discriminatory, and violates her constitutional rights.

(2) The second area concerns the standard to be applied for determining liability for federal income tax penalties for negligence. The Court of Appeals used a standard which conflicts with precedent in this Court and with the standard used by other federal courts.

REASONS FOR GRANTING THE WRIT

I. THE LITIGATION ISSUES: ERRONEOUS STATUTORY CONSTRUCTION OF TEFRA AND CONSTITUTIONAL VIOLATIONS

The TEFRA system distinguishes between litigation over partnership items of the partnership and non-partnership or "personal" items of a partner. The former

are litigated in a response to a final partnership administrative adjustment (FPAA) in a partnership level case. The partner or personal items are litigated in response to an IRS notice of deficiency in a partner level suit. Litigation to review a notice of deficiency is governed by Code § 6213.

There is a prohibition against raising partner items in the partnership case. Indeed, IRS does not even consider whether to issue a notice of deficiency against the partner until the partnership level case is concluded.

Penalties against a partner are such personal items asserted in a deficiency notice to the partner, liability for which depends on the individual circumstances of the partner, and possible assertion of which cannot occur until the partnership level case is ended. Until the partnership case is finished, no one knows whether a deficiency notice asserting penalties against the partner will be issued at all.

The present case is the partner level suit, in which the partner appealed from a deficiency notice asserting negligence penalties against her. Previously the partnership level case, involving a publicly held partnership named Barrister Associates Partnership, had ended. IRS thereafter decided to issue the deficiency notice to her. She then appealed to the Tax Court from the deficiency notice and defended against the penalties in the deficiency notice both on the merits and on an affirmative defense that the statute of limitations had expired.

The Court of Appeals, although recognizing that the limitations period had expired, held that the affirmative defense could not be made in this case together with her defense on the merits against the same deficiency notice. It held that her limitations defense against a partner deficiency notice had to be made in a prior litigation con-

cerned only with the partnership even though the merits of her defense against the deficiency notice would not be permitted to be made in that prior litigation but had to be made only in a second litigation brought by the partner.

The Court of Appeals holding compels the partner to split her defense against the single notice of deficiency, and exercise prophesy at the same time of the partnership case as to whether a deficiency notice will thereafter be issued. The Court of Appeals compels her to engage in that partnership case for that purpose even though the deficiency notice may never be issued, in which event her participation in the partnership case for that purpose is wasteful and useless. Otherwise the Court of Appeals penalizes her with a waiver of that affirmative defense if the deficiency notice does issue, even though she cannot litigate against the deficiency notice before it in fact issues in the future. She is thereby compelled to engage in two litigations to defend against a single deficiency notice, the first one on the tentative possibility that there may ensue a future deficiency notice, and in which she cannot litigate the merits of such a deficiency notice; and the second one only on the merits of the deficiency notice if it is issued, and in which she is precluded from raising the affirmative defense unless she has also engaged in the first litigation.

(A) The factual context in which these litigation issues arise is not in dispute:

(1) With respect to any income tax year in this case, only a single deficiency notice was issued by IRS and is involved. That deficiency notice asserts only tax penalties. App. 12a-13a.

(2) The asserted tax penalties are not partnership items, but rather partner, personal items. That is conceded by IRS through its use of a notice of deficiency to claim

those penalties. If partnership items were involved, the procedure would be that a computational adjustment which would be made after issuance of an FPAA, and a notice of deficiency would not be issued by IRS, as explained by the Court of Appeals in its opinion, 177 F.3d at 121 (App. 3a-4a).

(3) The notice of deficiency is used where the taxpayer's liability for the items claimed in the deficiency notice varies with the circumstances of the individual taxpayer. That is so in connection with the negligence penalties claimed here by IRS, as to which negligence by the taxpayer depends on the circumstances relating to that particular taxpayer.

(4) The statute of limitations, applicable to the deficiency notice in this case and to the penalties asserted here, has expired. IRS issued the deficiency notice after expiration of the limitations period. Thus, the Court of Appeals said (177 F.3d at 125) (App. 11a):

> "Aside from suggesting, without support in the record, that the tax matters partner probably granted an extension of the limitations period pursuant to IRC § 6229(b)(1)(B), the IRS does not refute the fact that the limitations period expired prior to its sending out the FPAA notices to Barrister and to petitioners. Instead, the IRS contends that petitioners may not raise a statute of limitations defense for the first time in their affected items proceedings, having failed to raise it at the earlier partnership level proceedings."

(B) Under TEFRA, partner items are prohibited from being litigated or raised in the partnership case, Partners can join the partnership case (Code § 6226(c)(2)) but are prohibited there from putting in issue partner items. Even if petitioners could prophesy that a deficiency notice

would be issued against them after the end of the partnership case, they would not be allowed to litigate the merits of the penalties in the partnership case. IRS itself has taken a strong position in support of that prohibition and has been affirmed in that respect. Thus, the Tax Court stated in *Affiliated Equipment Leasing II v. Commissioner*, 97 T.C. 575, at 578 (1991):

> "*Farris* involved a case where respondent issued a notice of deficiency to individual partners prior to any partnership level adjustment. The court held that we lack jurisdiction over affected items until the partnership level proceeding is concluded. Thus, *Farris* stands for the proposition that respondent has no authority to assess a deficiency attributable to a partnership item until after the close of a partnership proceeding. *NCF Energy Partners* and *White* have subsequently stated that Section 6621(c) interest is an affected item. As such, the applicability of such interest cannot be determined in a partnership level proceeding."

(C) The construction put on TEFRA by the Court of Appeals treats the statute of limitations defense by a partner, to partner items asserted in a notice of deficiency, as a partnership item which has to be litigated in the partnership case or else is waived by the partner. Nowhere in the Code or the IRS regulations is an affirmative defense to a partner or personal item said to be a partnership item. The available indications are to the contrary.

Code § 6231(a)(3) defines "partnership item". It says the term is used "with respect to a partnership", and therefore does not apply with respect to a partner, such as the limitations period applicable to a partner item. Moreover, that statutory term, as defined in that statute, is expressly restricted to any item "required to be taken

into account" "under any provision of subtitle A" of the Code. However, the statute of limitations is in Code § 6229, which is in subtitle F and not in subtitle A. The statute of limitations, at least as applied to a partner, is expressly excluded by this statutory definition from being a "partnership item". Moreover, even if it were otherwise under that definition, there is the further requirement under the definition that the particular item "is more appropriately determined at the partnership level than at the partner level." For reasons stated in this petition and further shown herein, the limitations period applicable to a partner item, the merits of which must be litigated in a partner level suit, is not "more appropriately" determined in the partnership level case.

IRS regulations under this statutory definition give examples of partnership items (Reg. § 301.6231(a)(3)-1) but the limitations period, a prominent item, is not included among them.

(D) The Court of Appeals construction of TEFRA leads to anomalous results which are not justified under TEFRA. That construction, in excluding that limitations defense from the partner level lawsuit against the deficiency notice and which is the only suit in which the defense on the merits against the deficiency notice is allowed, compels the partner to split her defenses and to engage in two lawsuits in order to assure her opportunity to assert all her defenses against the same single deficiency notice. That construction expands and even multiplies litigation instead of reducing it, and is not compatible with the rationale of TEFRA.

The limitations period is not necessarily the same for all partners in the same partnership. A partner, who is a possible prospect for assertion of penalties by IRS, typically goes through a period of audit and administrative

negotiations and appeals within IRS before the deficiency notice is issued, and, in advance of an approaching limitations deadline, is often asked for and agrees to an extension of the limitations period in order to enable continuation of that process.[2] TEFRA expressly provides in Code § 6229(b)(2)(A), that "with respect to any *partner*" such an extension agreement is authorized, and thus contemplates variations among partners in the same partnership as to their limitations periods. Such variations among the partners cannot be resolved by a single adjudication of the limitations period applicable to the partnership.

TEFRA also varies the limitations period "in the case of "*partners*", depending on whether the partner participated in or signed the partnership return, so that for some partners the limitations period would be six years instead of three years and for others there might not be any limitations period at all. Code § 6229(c)(1). Limitations periods of individual partners can also vary as a result of what is done by the individual partner on her own personal income tax return. Code § 6501(c)(1) and (2) and § 6501(e)(1). The limitations period under these provisions likewise can become six years if more than 25 percent of gross income on the return is omitted, or the limitations period can disappear completely if the return is intentionally false or fraudulent.

Invariably a partner's return has other items of income and deduction besides what comes through the partnership. Even if these other limitations provisions (Code § 6501) were to apply only to these other items, there would be two sets of different limitations provisions applicable to the same partner return, as to which a single deficiency notice is usual for a single tax year. In that

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[2] Provisions for extension of the limitations period appear both in Code § 6229(b)(1) and 6501(c)(4).

event, the holding of the Court of Appeals, requiring litigation of the limitations issue applicable to the partner items to be done in the partnership case and in which no partner or personal item is allowed to be litigated, would require two statute of limitations suits just to resolve separately the limitations issue regarding partner items and anything else on the partner's return. The Court of Appeals holding, requiring the limitations defense relating to partner items to be litigated only in the partnership case, produces two litigations just on statute of limitations defenses by the partner against the same notice of deficiency for the same year.

Furthermore, factual disagreements between the partner and IRS can affect which limitations period, or the absence of any limitations period, will apply as to any one partner. If the limitations issued as to partner items must be resolved in the partnership case or be waived, as the Court of Appeals has held, and if there are multiple partners in the partnership as commonly occurs, a number of separate trials would have to take place in the partnership case to resolve the factual issues as to the different partners. All this would happen in a case where the partnership litigation is supposed to be restricted under TEFRA to the partnership items of the partnership.

The very rationale of TEFRA, concentrating resolution of partnership items in a single partnership level case, militates against a requirement that a limitations issue, applicable to partner or personal items such as penalties, has to be asserted in the partnership level case or is waived and thereafter is barred from the partner level appeal against the subsequently issued notice of deficiency. The Court of Appeals construction is contrary to the rationale of TEFRA.

(E) The Court of Appeals holding discriminates against partners, such as the taxpayers in this case, by comparison to other taxpayers entitled to litigate their liability under an IRS notice of deficiency. The holding of the Court of Appeals deprives them of due process and equal protection of the law.

The right of a taxpayer to appeal and defend against a deficiency notice is prescribed by Code § 6213(a). The statute expressly prescribes a period of appeal (typically 90 days) to the Tax Court "*after*" the notice of deficiency is mailed to the taxpayer. In that appeal, the taxpayers are entitled to assert *all* their defenses against the deficiency notice, whether by way of the merits or by way of affirmative defense. The holding of the Court of Appeals conflicts with Code § 6213(a).

With respect to the notice of deficiency imposing the penalties on the taxpayers (Josephine and her deceased husband), in this case they defended against the IRS penalty determinations under this statute, Code § 6213. Yet the Court of Appeals, required them to litigate in advance, with respect to their limitations defense against the penalties, *before* a deficiency notice asserting the penalties is issued and even if it is never issued, under the penalty of waiver and loss of a defense if they guess wrongly. No other taxpayer is put in this penalizing position under Code § 6213.

Such advance litigation is wasteful and burdensome if the deficiency notice is not issued. That is even more so where the partner is not interested in disputing partnership items or, as here in the case of Josephine and her deceased husband, for other reasons is unable to participate in the partnership case. They were elderly people, engrossed in dealing with life-threatening medical condi-

tions detailed hereafter in connection with the penalty issue. No other taxpayer is put in that position.

In this case, Josephine and her deceased husband are required to split their defenses against the same deficiency notice, and engage in multiple litigation against the same single deficiency notice. No other taxpayer is put in that position, particularly under Code § 6213(a).

Moreover, in one of those litigations at the partnership level, there may be a diversity of interests of different partners with a variety of facts applicable to the limitations issues, making the multiple litigation even more onerous.

In addition, it is important to notice discrimination as to the place of litigation. Under Code § 6226(a), the partnership level case can be brought, at the choice of the partnership, either in the Tax Court, or the U.S. District Court in the district where the partnership principal place of business is located, or in the Claims Court. Any of those venues may be in any part of the United States at a long distance from the location of the individual partner. In contrast, in deficiency notice litigation in the Tax Court, a partner, such as Josephine, can litigate at a Tax Court facility close to her home. In the present case it was done at Hartford, Connecticut, in contrast to the distant location selected by a public partnership for its own convenience. No other taxpayer defending against a deficiency notice is subjected to the inconvenience and expense imposed on Josephine and her deceased husband in litigating at such a distance. For them it was a prohibitive and discriminatory hardship, in view of their circumstances, which made participation in the partnership action practically impossible.

The discrimination against Josephine and her husband, with respect to penalties imposed on them in a deficiency

notice, infringed their constitutional rights to due process and equal protection of the law. Those constitutional requirements forbid "the granting of . . . relief to one man and the denying it to another under like circumstances and in the same territorial jurisdiction." *Truax v. Corrigan*, 257 U.S. 312, 334 (1921). They likewise forbid imposing burdens for relief on one man which are absent for another under like circumstances. Claims of violation of constitutional rights were made before the Court of Appeals and the Tax Court but no ruling was made on them.

Petitioners are entitled to a decision of their claims of constitutional violations. It was error for the Court of appeals to omit ruling on those constitutional issues.

(F) The cases cited by the Court of Appeals in its opinion, in holding that the limitations defense to the personal penalties had to be asserted in the partnership level suit and that the defense against the deficiency notice could not be asserted in the partner level action against the notice of deficiency, do not support that ruling. Those cases involved application of the statute of limitations to partnership items, and therefore it was held that the limitations claim against partnership items had to be made in the partnership suit. That is no precedent for this case, where the items involved are not partnership items but partner or personal items (penalties), liability for which depends on the particular circumstances of the partner. Those cases were also different in being refund suits subject to a statutory prohibition in Code § 7422(h) in contrast to this deficiency notice suit governed by Code § 6213(a).

Thus, in *Kaplan v. United States*, 133 F.3d 469 (7th Cir. 1998), a refund action, partnership deductions were involved and the refund suit was also barred by Code

§ 7422(h). Partnership items and § 7422(h) were likewise involved in *Thomas v. United States*, 967 F. Supp. 505 (N.D. Ga. 1997). So, too, partnership items and not personal or "affected" items were involved in *Shapiro v. United States*, 951 F. Supp. 1019 (S.D. Fla. 1996) and *Kelley v. United States*, 98-2 U.S.T.C. (CCH) ¶ 50, 508 (N.D. Ill. 1998).

II. THE NEGLIGENCE PENALTY ISSUE: CONFLICT WITH THIS COURT AND OTHER FEDERAL COURTS

The taxpayers were held liable for the negligence penalties because of a single fact, to the exclusion of all the other relevant circumstances applicable to their investment in the Barrister partnership. Thus, the Court of Appeals stated in its opinion (177 F.3d at 126):

> "We review for clear error the Tax Court's factual finding that taxpayers were liable for such penalties because their reliance on the advice of John Santella was unreasonable."

The Tax Court relied on that single fact and was affirmed on the basis of that single fact. That was the wrong standard of negligence for application of the penalties under the requirements of this Court, and was in conflict with the standard applied by other federal courts. Moreover, since the question was the proper standard to be applied for imposing the penalties, the appellate review should have been *de novo* and not just for clear error.

The circumstances in which Josephine and her mortally ill husband made the investment in 1983 are not in dispute. Josephine was born in 1912. Her education stopped with elementary school; she never attended a secretarial or business school or had any education beyond the elementary level; and never had any business experience. Even after she was married, she worked by cleaning

homes. Her husband Anthony was a bricklayer, who joined his brothers' business. He retired from that business in 1973 because of poor health, and became progressively worse until he died in 1984, shortly after the investment was made. During those years he developed a heart condition, for which he had surgery. During the same period he was afflicted with cancer of the colon and cancer of the liver. At the same time Josephine had a serious heart condition.

Their life-threatening illnesses and resulting medical treatment engaged their entire effort and attention and caused an emotional drain, all of which limited them as to where they could go and to whom they could speak. Nor did they have the education or experience to realize what ought to be done. They only knew John Santella, an experienced certified public accountant and trusted business advisor of the brothers, and in their circumstances they turned to him. That was the most they could be expected to do in their conditions.

Santella advised them to invest in the Barrister partnership to create income for the future, and in their predicament they followed his advice.

Recognizing the limitations on the taxpayers, IRS stipulated with the petitioners and admitted in the Tax Court that Josephine and her husband were not tax-motivated in making their investment in Barrister (App. 39a). As a result, IRS conceded that the taxpayers were not subject to the interest penalty in Code § 6621(c) for tax-motivated transactions.

Reflecting the single-fact approach of both the Tax Court and the Court of Appeals, they ignored the IRS concession and agreement in deciding whether tax penalties applied.

This Court has approved the principle "that a taxpayer should not be penalized for circumstances beyond his con-

trol" (*U.S. v. Boyle*, 469 U.S. 241, at 248 n.6 (1985)), stating, further (*Ibid.*):

> "This principle might well cover a filing default by a taxpayer who relied on an attorney or accountant because the taxpayer was, for some reason, incapable by objective standards of meeting the criteria of 'ordinary business care and prudence.' In that situation, however, the disability alone could well be an acceptable excuse for a late filing."

A concurring opinion by Justice Brennan emphasized the point made by the Court, stating (at 253):

> "I write separately, however, to underscore the importance of an issue that the Court expressly leaves open. Specifically, I believe there is a substantial argument that the 'ordinary business care and prudence' standard is applicable only to the 'ordinary person'—namely, one who is physically and mentally capable of knowing, remembering and complying with a filing deadline."

The situation in the present case is precisely the one which this Court said in *Boyle* should not be subjected to penalties. Certainly *Boyle* shows that the circumstances present here, besides the qualifications of Santella, were relevant. The Court of Appeals and the Tax Court, in disregarding all these other circumstances, used the wrong standard and acted in conflict with this Court.

The single-fact standard used here also is in conflict with the standard used by other federal courts, who take into account all relevant circumstances, including those of the kind ignored here by the Court of Appeals. See *Kantor v. Commissioner*, 998 F.2d 1514 (9th Cir. 1993); *Heasley v. Commissioner*, 902 F.2d 380 (5th Cir. 1990); *Ian Fern Gray v. Commissioner*, T.C. Memo. 1982-392.

Contrary to the Court of Appeals here, the Ninth Circuit in *Vorsheck v. Commissioner*, 933 F.2d 757 (9th

Cir. 1991) applied a different standard and pointed to an IRS regulation under Code § 6661 which provided:

> "Reliance on an information return, professional advice, or other facts, however, would constitute a showing of reasonable cause and good faith if, under all the circumstances, such reliance was reasonable and the taxpayer acted in good faith."

The Court of Appeals applied the wrong standard in ignoring relevant circumstances including the IRS concession that the taxpayers' action was not tax-motivated, in conflict with the requirements of this Court and the standard used by other federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 12, 1999

APPENDICES

APPENDIX A
OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1998

(Argued March 15, 1999 Decided May 17, 1999)

Docket Nos. 98-4306(L), 98-4307(CON)

JOSEPHINE CHIMBLO, ESTATE OF ANTHONY J. CHIMBLO, Deceased, Rosalie Monahan, Executrix, and CATHERINE CHIMBLO, ESTATE OF GUS CHIMBLO, Deceased, Catherine Chimblo, Executrix,

Petitioners-Appellants,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Before:

WALKER and CABRANES, *Circuit Judges,*
and TSOUCALAS, *Judge.**

WALKER, *Circuit Judge*:

Petitioners appeal from the decisions of the United States Tax Court (Dinan, *J.*), rejecting their contention

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* The Honorable Nicholas Tsoucalas of the United States Court of International Trade, sitting by designation.

that they were not properly notified of earlier partnership proceedings which led to the determination of petitioners' tax deficiencies, and finding petitioners liable for additions to tax stemming from petitioners' negligence in substantially underpaying their taxes. We affirm.

I. BACKGROUND

A. *Statutory Framework*

Before reciting the facts relevant to this dispute, it is useful to outline briefly the statutory context in which the case arises. In 1982, as part of the Tax Equity and Fiscal Responsibility Act ("TEFRA"), *see* Pub. L. No. 97-248, § 402(a), 96 Stat. 324, Congress enacted the unified partnership audit examination and litigation provisions of the Internal Revenue Code ("IRC"), now found, as amended, at 26 U.S.C. §§ 6221-6234. These provisions centralized the treatment of partnership taxation issues, and "ensure[d] equal treatment of partners by uniformly adjusting partners' tax liabilities." *Kaplan v. United States*, 133 F.3d 469, 471 (7th Cir. 1998) (citing Staff of the Joint Committee on Taxation, 97th Cong., 2d Sess., General Explanation of the Revenue Provisions of the Tax Equity and Responsibility Act of 1982, at 268); *see also Transpac Drilling Venture 1982-12 v. Commissioner*, 147 F.3d 221, 223 (2d Cir. 1998); *Randell v. United States*, 64 F.3d 101, 103-04 (2d Cir. 1995). Prior to TEFRA's enactment, multiple proceedings were required to address the tax treatment of partnership issues, because partnerships are not separately taxable entities and partnership income and expenses "pass through" to the individual partners. *See* IRC §§ 701, 6031.

Under TEFRA, the Commissioner must notify partners of the beginning and end of partnership-level administrative proceedings. *See* IRC § 6223. Upon issuance of a

notice of final partnership administrative adjustment ("FPAA"), the "tax matters" partner—a person or entity designated as such by the partnership under applicable regulations or, most commonly, the general partner with the largest profit stake in the partnership, *see* IRC § 6231(a)(7)—may, within 90 days, contest the FPAA by filing a petition for readjustment of "partnership items" in Tax Court, the Court of Federal Claims, or the appropriate federal district court. IRC § 6226(a). A "partnership item" is "any item required to be taken into account for the partnership's taxable year . . . [that] is more appropriately determined at the partnership level than at the partner level." IRC § 6231(a)(3). If no such petition is filed by the tax matters partner within the 90-day period, any notice partner or five-percent group may file a petition within the next 60 days. *See* IRC § 6226(b)(1). Any partner "with an interest in the outcome of the proceeding [is] entitled to participate in an action brought by the tax matters partner or a notice partner, [IRC] §§ 6626(c), 6626(d), thereby meeting TEFRA's objective of ensuring that all partners may . . . litigate a dispute with the IRS in a single proceeding." *Randell*, 64 F.3d at 104.

Changes in the tax liabilities of individual partners which result from the correct treatment of partnership items determined at the partnership level proceeding are defined under TEFRA as "computational adjustments." IRC § 6231(a)(6). If no petition for readjustment is filed within 150 days after the mailing of the FPAAs by the Commissioner, tax deficiencies attributable to partnership items, as determined in the FPAAs, may be assessed as computational adjustments against the individual partners without further delay. If, however, a readjustment proceeding is commenced, the assessment of any tax defi-

ciencies as computational adjustments must wait until the decisions of the court are final. *See* IRC § 6225.

TEFRA contemplates the Commissioner's determination at the individual partner level of "affected items," which are defined as "any item to the extent such item is affected by a partnership item." IRC § 6231(a)(5). Penalties assessed against a partner based on the partner's tax treatment of partnership items on his individual return are examples of affected items. *See Olson v. United States*, Nos. 98-5053, 98-5065, 98-5066, 98-5067, 98-5110, 1999 U.S. App. LEXIS 1751, at *19-20 (Fed. Cir. Feb. 8, 1999); *N.C.F. Energy Partners v. Commissioner*, 89 T.C. 741, 744-46 (1987). A partner must be afforded notice of any tax deficiency pursuant to IRC § 6212, and he or she can contest the determination of affected items pursuant to IRC § 6213.

B. *The Barrister Partnership Investment*

In late 1983 and early 1984, Gus Chimblo and his wife Catherine invested $25,000 in a partnership known as the Barrister Equipment Associates Series 151 ("Barrister" or "Barrister Partnership"). Gus's brother Anthony J. Chimblo and his wife Josephine also invested $25,000, although Josephine handled the transaction alone because of Anthony's failing health. The investments were made on the advice of John Santella, the Chimblos' family accountant and a financial advisor to the Chimblo brothers' construction business. Santella also prepared the Chimblos' individual federal income tax returns. Prior to meeting with Santella about the proposed investment, neither Josephine nor Catherine had heard of Barrister, and neither could recall reviewing any documentation describing the Barrister investment either before or after investing.[1]

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[1] Anthony and Gus Chimblo died in 1984 and 1988, respectively. John Santella died in 1996, before the trial in the tax court. Thus,

According to disclosure statements attached to its 1983 and 1984 tax returns, the Barrister Partnership's sole business was printing and selling "49 different literary works and microcomputer disks aimed at a general public market, using leased films, plates and disks to produce said products." On its 1983 and 1984 returns, the Barrister Partnership claimed ordinary losses in the amounts of $848,599 and $1,059,623, respectively, and qualified investment tax credit property in the amounts of $18,809,-500 and $6,110,000, respectively.

The two Chimblo couples claimed their distributive shares of the pass-through losses and investment tax credits reported by the Barrister Partnership on their 1983 and 1984 income tax returns. Thus, both couples claimed ordinary loss deductions of $10,477 in 1983 and $13,083 in 1984, and investment tax credits of $18,578 in 1983 and $6,035 in 1984. More precisely, Gus and Catherine used only $7,817 of their 1983 investment tax credit on their tax return for 1983, but they filed amended tax returns for 1980 and 1982, carrying back the unused portions of the 1983 investment tax credit to offset their previously reported tax liability by $9,571 for 1980 and by $1,190 for 1982. Anthony and Josephine used none of their investment tax credit in 1983, but they filed amended returns for 1980 and 1981, carrying back their unused 1983 credit to offset tax liabilities previously reported for 1980 and 1981 in the respective amounts of $11,893 and $6,685.

C. *Assessment of Tax Deficiencies*

On September 5, 1989, the Commissioner mailed to the Barrister partners, including taxpayers, notices of FPAAs determining adjustments to Barrister's 1983 and 1984

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at trial, Catherine and Josephine were the only people able to offer testimony regarding their Barrister investments.

partnership returns. After Barrister's tax matters partner instituted proceedings in the Tax Court on behalf of the partnership, the Tax Court entered a stipulated decision on February 17, 1995, determining that none of the losses claimed by Barrister for 1983 and 1984 was allowed and that the qualified investment tax credit property for those years was zero.

As a consequence of that decision, the Commissioner assessed against petitioners, as computational adjustments, the tax deficiencies attributable to the losses and investment tax credits claimed by petitioners as related to the Barrister Partnership. *See* IRC §§ 6225, 6230(a)(1), & 6231(a)(6). Because Catherine and Gus Chimblo had carried back portions of the tax credit claimed for 1983, tax deficiencies were assessed for 1980 and 1982, as well as for 1983 and 1984. The deficiencies assessed in these years were for $9,571 in 1980, $1,190 in 1981, $12,387 in 1983, and $12,577 in 1984. Because of carry-backs claimed by Josephine and Anthony Chimblo, tax deficiencies were assesed against them for 1980 and 1981 in the respective amounts of $11,893 and $6,685. The Commissioner also assessed statutory interest due on the underpayments of tax. The interest amounts were computed under IRC § 6621(c) (1986), which provided for an increased rate of interest (120% of the normal rate) to be applied on substantial underpayments of tax that result from tax-motivated transactions.

On April 29, 1996, the Commissioner, pursuant to IRC § 6212, mailed separate notices of deficiency for taxable years 1980, 1982, 1983 and 1984 to taxpayers Gus Chimblo (deceased) and Catherine Chimblo. On May 3, 1996, the Commissioner also mailed separate notices of deficiency for taxable years 1980 and 1981 to Anthony J. Chimblo (deceased) and Josephine Chimblo. By the notices, which form the basis for the instant case, the Com-

missioner determined, with respect to the tax deficiencies arising out of the Barrister partnership-level proceedings, that taxpayers were liable for affected items, *see* IRC §§ 6230(a)(2)(A)(i), 6231(a)(5), required to be determined at the partner level. Specifically, the Commissioner asserted that petitioners were liable for additions to tax for negligence under then-existing IRC § 6653(a), and additions to tax for substantial underpayment of taxes under then-existing IRC § 6661.

D. *The Tax Court Proceedings*

On July 26, 1996, Gus (by Catherine, as executrix of his estate) and Catherine timely mailed a petition to the Tax Court in response to the notices of deficiency. On July 31, 1996, Anthony (by Rosalie Monahan, executrix of his estate) and Josephine did the same. Petitioners' cases were consolidated by the Tax Court for all purposes.

In their petitions, taxpayers claimed that they had reasonably relied on their accountant's advice in making the investment in Barrister and that therefore they should not be held liable for negligence penalties. They also sought the return of alleged overpayments of assessed interest, on the grounds that (1) they had paid the interest assessed against them on the underlying tax deficiencies, and (2) the Barrister Partnership transactions were not tax-motivated, making inapplicable the increased rate of interest under IRC § 6621(c) (1986).

The Tax Court held a trial on May 13, 1997. The Commissioner conceded that the understatements of tax assessed against petitioners as a result of the earlier partnership-level proceedings were not attributable to tax-motivated transactions, thus making inapplicable the increased rate of interest under IRC § 6621(c) (1986). Accordingly, the Commissioner advised the Tax Court and petitioners that the overpayments of interest would

be abated and refunded or credited to petitioners. The parties submitted stipulations of facts in both cases, and the Tax Court then proceeded to hear testimony from Catherine and Josephine Chimblo regarding their investments in Barrister and their dealings with the IRS.

After trial, the parties submitted post-trial briefs, in which petitioners asserted, for the first time, that the statute of limitations set forth at IRC § 6229(a) expired prior to the issuance of FPAAs relating to the Barrister partnership-level proceeding and thus barred the Commissioner's assertion of penalties in their individual cases. They contended that they were not negligent with respect to their tax treatment of the Barrister investments because they reasonably relied on John Santella's advice. Petitioners also alleged, apparently for the first time, that the Commissioner abused his discretion in failing to waive the substantial understatement penalties asserted against petitioners pursuant to IRC § 6661(c). Finally, petitioners argued that they were entitled to a refund of an overpayment of interest because of the Commissioner's concession that § 6621(c)'s increased interest provision was inapplicable, and that they were entitled to a refund of tax and interest if the Tax Court agreed with their statute of limitations contention.

In a memorandum opinion dated December 3, 1997, *see Chimblo v. Commissioner*, 74 T.C.M. (CCH) 1307 (1997), the Tax Court found: (1) that petitioners had been sent a notice of FPAA, and thus could have appeared and represented their interests in the earlier Barrister partnership-level proceeding; (2) that petitioners' failure to raise a statute of limitations defense at the earlier partnership-level proceeding foreclosed consideration of that defense at the partner-level; (3) that the Commissioner had erroneously asserted a negligence penalty for 1980 under IRC §§ 6653(a)(1) and (2)—provisions which were not in effect prior to 1981—meaning that pe-

titioners could not be held liable for the § 6653(a)(2) additions to tax for 1980, although liability under § 6653(a) remained undisturbed; (4) that petitioners' reliance on Mr. Santella's advice with regard to the tax treatment of the Barrister investment was not reasonable under the circumstances, thus sustaining the Commissioner's finding of negligence under § 6653(a); and (5) that since there was no evidence in the record that petitioners had requested a waiver of substantial underpayment penalties imposed under § 6661, there was no basis for finding that the Commissioner abused his discretion in declining to waive them.

The Tax Court entered its decisions pursuant to Tax Court Rule 155, which establishes a procedure by which the parties determine the financial ramifications of the court's decisions. *See Estate of Shapiro v. Commissioner*, 111 F.3d 1010, 1013 n.4 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 686 (1998). Under Rule 155, "[e]ach party submits its own calculations [to the court], and, if there is a discrepancy, the court resolves it." *Id.*

After the parties submitted their respective proposed computations under Rule 155, petitioners objected to the Commissioner's calculations on the ground that the interest overpayment amounts set forth by the Commissioner failed to account for interest payments petitioners made toward the assessments against them under IRC § 6621(c). The Tax Court adopted the computations submitted by the Commissioner over petitioners' objections. On June 5, 1998, the Tax Court entered decisions reflecting that petitioners are liable for the following penalties and are due interest overpayments in the following amounts:

	$6653(a)	$6653 (a)(1)	$6653 (a)(2)	§ 6661	Overpayments Interest
Catherine and Gus:					
1980	$479	——	——	——	$18,326.43
1982	——	$60	*	——	$1,442.00
1983	——	$619	**	$3,097	$2,260.27
1984	——	$629	***	$3,144	——
Josephine and Anthony:					
1980	$595	——	——	——	$27,695.05
1981	——	$334	****	——	$15,567.29

* 50 percent of the interest due on $1,190
** 50 percent of the interest due on $12,387
*** 50 percent of the interest due on $12,577
**** 50 percent of the interest due on $6,685

II. DISCUSSION

On appeal, petitioners challenge each of the Tax Court's decisions, as well as its failure to quantify the amount of the negligence penalty imposed under IRC § 6653(a)(2). We consider each contention in turn.

A. *The Statute of Limitations Defense*

Petitioners claim that the Tax Court erred when it held that they had waived any statute of limitations defense by failing to raise it in the earlier Barrister partnership-level proceeding. The basic facts relevant to this contention are not in dispute. The Barrister Partnership's returns for 1983 and 1984 were filed on April 15, 1984 and 1985, respectively. Under IRC § 6229(a)(1), the statute of limitations for assessing taxes "attributable to any partnership item (or affected item) for a partnership taxable year" expired three years after Barrister filed its returns, or on April 15, 1987 and 1988. The Tax Court found that the Commissioner mailed the FPAA to the tax matters partner and to petitioners on September 5, 1989, after the three-year statute of limitations expired. We have been provided no reason to disturb this finding.

Aside from suggesting, without support in the record, that the tax matters partner probably granted an extension of the limitations period pursuant to IRC § 6229 (b)(1)(B), the IRS does not refute the fact that the limitations period expired prior to its sending out the FPAA notices to Barrister and to petitioners. Instead, the IRS contends that petitioners may not raise a statute of limitations defense for the first time in their affected items proceedings, having failed to raise it at the earlier partnership level proceedings. We agree.

As a general matter the statute of limitations is an affirmative defense that must be pleaded; it is not jurisdictional. *See Columbia Bldg., Ltd. v. Commissioner*, 98 T.C. 607, 611 (1992). It follows that such a defense may be waived by a party who fails to raise it at the appropriate time.

In the context of this case, one involving the application of TEFRA, petitioners had a right to raise the partnership's statute of limitations defense in the earlier partnership-level proceeding but failed to do so. We join the Seventh Circuit, as well as the numerous lower courts that have held that, under TEFRA, a statute of limitations defense concerns a "partnership item," *see* IRC § 6231 (a)(3), that must be raised at the partnership level. *See, e.g., Kaplan*, 133 F.3d at 473 (holding that district court lacked subject matter jurisdiction, in individual tax partner's refund challenge, to consider statute of limitations argument); *Kelley v. United States*, No. 97 C 3104, 1998 U.S. Dist. LEXIS 8903, at *7-10 (N.D. Ill. June 8, 1998) ("Whether the IRS assessed the . . . partnership within the applicable statute of limitations period is . . . a partnership item."); *Thomas v. United States*, 967 F. Supp. 505, 506 (N.D. Ga. 1997) (agreeing with IRS contention that taxpayer "should not be permitted to assert a statute of limitations defense in [a partner-level

proceeding] as it pertains to the FPAAs and therefore should have been prosecuted within the context of a partnership[-]level proceeding"); *Shapiro v. United States*, 951 F. Supp. 1019, 1024 (S.D. Fla. 1996) (holding that res judicata barred taxpayers from raising statute of limitations defense at partner-level proceeding where taxpayers could have raised defense at partnership-level proceeding). Allowing individual taxpayers to raise a statute of limitations defense in multiple partner-level proceedings would undermine TEFRA's dual goals of centralizing the treatment of partnership items and ensuring the equal treatment of partners. Accordingly, we hold that petitioners are barred from raising their statute of limitations defense in this partner-level, affected items proceeding.

B. *Additions to Tax for Negligence*

IRC § 6653(a)(1),[2] as in effect during the years in question other than 1980, provided for additions to tax if any part of any underpayment of tax was attributable to the taxpayer's negligence. Negligence under § 6653(a) required a "lack of due care or [a] failure to do what a reasonable and prudent person would do under the circumstances." *See Goldman v. Commissioner*, 39 F.3d 402, 407 (2d Cir. 1994) (quotation marks and citation omitted). Upon a finding of negligence, § 6653(a)(1) provided for an addition to tax equal to five percent of the underpayment. Section 6653(a)(2), in turn, imposed an addition of 50 percent of the interest applicable under IRC § 6601. We review for clear error the Tax Court's factual finding that taxpayers were liable for such penalties because their reliance on the advice of John Santella was unreasonable. *See Goldman*, 39 F.3d at 406.

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[2] The negligence addition to tax is now found at IRC § 6662. *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, §§ 7721(a), (c)(1), 103 Stat. 2106, 2395-96, 2399.

Petitioners contend that the Tax Court erred in making this finding and failed to consider evidence that Gus and Anthony Chimblo were consumed by illness and all four taxpayers lacked the education or experience needed to evaluate the legitimacy of the tax benefits offered by the Barrister Partnership investment. They claim further that these circumstances made reliance on their trusted business advisor and accountant reasonable.

Despite the sympathetic facts presented by appellants, there is sufficient evidence in the record to support the Tax Court's finding of negligence. The evidence in the record did not establish that Mr. Santella was qualified to render an expert opinion to the taxpayers as to the business merits of Barrister's purported investment in the publishing business. Nor is there any explanation for why petitioners failed to voice a concern to their advisor over the absence of any generated income and the eventual complete loss of their original $25,000 investments, which turned out, not surprisingly, to amount to substantially less than the deducted losses and investment credits taxpayers ultimately claimed. *See David v. Commissioner*, 43 F.3d 788, 789-90 (2d Cir. 1995) (finding taxpayers negligent despite reliance on accountants because accountants lacked knowledge of the business invested in and because partnership's "too-good-to-be-true" offering was clear indication that partnership was created only to generate tax deductions); *Goldman*, 39 F.3d at 408 (same). Accordingly, we affirm the Tax Court's finding of liability for negligence penalties under IRC § 6653(a).

C. *Additions to Tax for Substantial Understatement of Taxes*

As in effect during the 1983 and 1984 taxable years, IRC § 6661(a)[3] provided that if there were a "substantial

[3] This provision was repealed in 1989. *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7721(c)(2), 103 Stat. 2399.

understatement" of income tax for a taxable year, a penalty of 25 percent of the amount of the underpayment attributable to the understatement would be imposed. An understatement was deemed substantial if it exceeded the greater of 10 percent of the tax required to be shown on the return or $5,000. *See* IRC § 6661(b)(1)(A).

Here, the Commissioner determined that Gus and Catherine had understated their taxes for 1983 and 1984 by $12,387 and $12,577, respectively. Under the statutory definition set forth above, these understatements were "substantial." Petitioners, however, relying on the same facts which form the basis of their challenge to the Tax Court's finding of negligence under § 6653(a), challenge the imposition of penalties under § 6661 and the Commissioner's failure to waive the penalties under IRC § 6661(c), which gives the Commissioner discretion to waive all or part of the penalty upon a showing of reasonable cause or good faith.

We agree with the Tax Court that the Commissioner could not have abused his discretion in declining to waive the penalty where petitioners failed to request such a waiver in the first instance. *See, e.g., McCoy Enters., Inc. v. Commissioner*, 58 F.3d 557, 562-63 (10th Cir. 1995). Accordingly, we need not reach the merits of petitioners' contention that their reliance on the advice of their accountant constitutes a basis for waiving a substantial understatement penalty under § 6661(c).

D. *The Tax Court's Computation of Petitioner's Penalty Liabilities and Interest Overpayment*

Since the "[i]ssues considered in a [Tax Court] Rule 155 proceeding are limited to 'purely mathematically generated computational items,' " *Harris v. Commissioner*, 99 T.C. 121, 124 (1992) (quoting *The Home Group, Inc. v. Commissioner*, 91 T.C. 265, 269 (1988)), we will

review the Tax Court's computations under Rule 155 for abuse of discretion, *see Erhard v. Commissioner*, 46 F.3d 1470, 1479 (9th Cir. 1995).

With respect to the Rule 155 computations, petitioners contend that the Tax Court erred in (1) calculating the amount of petitioners' interest overpayment, and (2) failing to set forth in dollar terms (rather than by reference to the percentage of the interest due on their tax deficiencies under IRC § 6601, *see* Part I.D. *supra*) the amount of the negligence penalty assessed under IRC § 6653(a)(2). We briefly consider each contention.

1. *Calculation of Interest Overpayments*

With respect to the interest overpayment amounts, petitioners appear to contend that since the Commissioner conceded at trial that petitioners were not liable for an increased rate of interest under IRC § 6621(c) (for underpayments resulting from tax-motivated transactions), they are entitled to a return of all interest payments made to the IRS. This contention is unavailing. Though petitioners were not assessed an increased rate of interest under §6621(c) on the amount of their underpayments for the years in question, they were still liable for (and were appropriately assessed) regular interest under IRC § 6601 on the amount of the underpayments. While any confusion on the part of petitioners is understandable given the disorienting nature of the Commissioner's computations, petitioners have provided no additional ground for finding that the Tax Court abused his discretion in adopting the Commissioner's computations as they relate to the amounts of interest abated and set forth as overpayments of interest in the Rule 155 calculations (*see* Part I.D. *supra*).

2. *Negligence Penalties under IRC § 6653(a)(2)*

As noted above, the amount of the penalty imposed under IRC § 6653(a)(2) is equal to 50 percent of the

statutory interest due on the underlying tax underpayment attributable to negligence. Petitioners claim that it was error for the Tax Court to set forth the amounts due from petiitoners in those terms, rather than specifying the amounts due in dollar terms. We disagree.

Often the Tax Court will be unable to specify the § 6653(a)(2) penalty in dollar terms because the underlying interest will not have been paid at the time of the Tax Court's decision and it continues to accrue to and including the date of payment. While in this case the Tax Court could have set forth the § 6653(a)(2) penalty in dollar terms because petitioners had already paid the tax deficiencies to the IRS, it was not error to fail to do so. Moreover, petitioners were not harmed by the oversight because the amounts are easily calculated by the parties by applying the 50-percent penalty rate to the amount of regular interest due on the tax deficiencies—amounts that are no longer in dispute.

CONCLUSION

For the foregoing reasons, the decisions of the Tax Court are affirmed.

APPENDIX B
OPINION OF UNITED STATES TAX COURT

UNITED STATES TAX COURT

T.C. Memo. 1997-535

CATHERINE CHIMBLO AND ESTATE OF GUS CHIMBLO, DECEASED, CATHERINE CHIMBLO, EXECUTRIX,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

JOSEPHINE CHIMBLO AND ESTATE OF ANTHONY J. CHIMBLO, DECEASED, ROSALIE MONAHAN, EXECUTRIX,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Docket Nos. 16545-96, 16804-96 Filed December 3, 1997

MEMORANDUM OPINION

DINAN, *Special Trial Judge*: These consolidated cases were heard pursuant to the provisions of section 7443A (b)(3) and Rules 180, 121, and 182.[1]

Respondent determined additions to petitioners' Federal income taxes for the years as indicated:

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[1] Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the taxable years in issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

Catherine Chimblo and Estate of Gus Chimblo, Deceased, Catherine Chimblo, Executrix, docket No. 16546-96

Year	Sec. 6653(a)(1)	Sec. 6653(a)(2)	Sec. 6661
1980	$479	*	——
1982	60	*	——
1983	619	*	$3,097
1984	629	*	3,144

* 50% of the interest due on the deficiency.

Josephine Chimblo and Estate of Anthony J. Chimblo, Deceased, Rosalie Monahan, Executrix, docket No. 16804-96

Year	Sec. 6653(a)(1)	Sec. 6653(a)(2)
1980	$595	*
1981	$334	*

* 50% of the interest due on the deficiency.

The issues for decision are: (1) Whether respondent properly notified petitioners of the underlying partnership proceeding which led to the deficiencies upon which the additions to tax in these cases are based; (2) whether petitioners are liable for the section 6653(a) additions to tax as determined by respondent; and (3) whether petitioners Catherine Chimblo and Estate of Gus Chimblo are liable for the section 6661 additions to tax for substantial understatements of income tax for 1983 and 1984.

Some of the facts have been stipulated and are so found. The stipulations of fact and attached exhibits are incorporated herein by this reference. Petitioner Catherine Chimblo resided in Stamford, Connecticut, and petitioner Josephine Chimblo resided in Cos Cob, Connecticut, on the dates their respective petitions were filed in these cases.

Petitioner Catherine Chimblo (Catherine) was married to Gus Chimblo (Gus) until his death on March 22, 1998. Petitioner Josephine Chimblo (Josephine) was

married to Anthony J. Chimblo (Anthony) until his death on March 21, 1984.

In December of 1983, Gus and his sister-in-law Josephine each invested $25,000 in Barrister Equipment Associates Series 151 (the Barrister partnership). Their respective Schedules K-1 from the Barrister partnership show their capital contributed during 1983 as such amounts. The investments were made on the advice of the Chimblos' family accountant, John Santella. Mr. Santella died in 1996, prior to the trial in this case. After his death, Mr. Santella's son, John Santella Jr., acted as the Chimblos' accountant.

On its 1983 and 1984 returns the Barrister partnership claimed ordinary losses in the amounts of $848,599 and $1,059,623, respectively, and qualified investment credit property in the amounts of $18,809,500 and $6,110,000, respectively. The Barrister partnership attached disclosure statements to its 1983 and 1984 returns which state that its sole business was "the printing and sale of 49 different literary works and microcomputer disks aimed at a general public market, using leased films, plates and disks to produce said products."

On their 1983 return, Catherine and Gus claimed an ordinary loss in the amount of $10,477 and an investment tax credit in the amount of $18,578 with respect to their $25,000 investment. Since the alternative minimum tax nullified the benefit of part of the investment tax credit for 1983, Catherine and Gus filed amended returns for 1980 and 1982 to carry back portions of the 1983 credit to offset their previously reported tax liability for the 1980 and 1982 taxable years.[2] They also claimed

[2] The parties stipulated that the amounts of the investment tax credit carrybacks for 1980 and 1982 are $9,571 and $1,190, respectively, which differ from the amounts claimed on the 1980 and

an ordinary loss in the amount of $13,083 and an investment tax credit in the amount of $6,035 for their 1984 taxable year with respect to their investment in the Barrister partnership.

On their 1983 return, Josephine and Anthony claimed an ordinary loss in the amount of $10,477 and an investment tax credit in the amount of $18,578 with respect to their $25,000 investment. Since the alternative minimum tax nullified the entire benefit of the investment tax credit for 1983, Josephine and Anthony filed amended returns for 1980 and 1981 to carry back portions of the 1983 credit to offset their previously reported tax liability for the 1980 and 1981 taxable years.

Pursuant to the agreement of the parties in the underlying partnership proceeding, this Court entered a stipulated decision on February 17, 1995, which decided that the none of the losses claimed by Barrister partnership for 1983 and 1984 were zero.[3] Respondent thereafter made computational adjustments disallowing the losses and investment tax credits claimed by petitioners with respect to the Barrister partnership.

The first issue for decision is whether respondent properly notified petitioners of the Barrister partnership proceeding for its 1983 and 1984 taxable years. We have jurisdiction in these cases to decide whether respondent complied with the notice requirements of section 6623(a) allowing petitioners the opportunity to participate in the

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1982 amended returns ($4,577 and $6,184). Since we have found no explanation in the record for these differences, and the parties have not made any reservations to their stipulations, we accept the amounts stipulated as correct.

[3] *Anderson Equipment Associates, et al., Barrister Associates, Tax Matters Partner v. Commissioner*, docket No. 27745-89.

partnership level proceeding. *Crowell v. Commissioner*, 102 T.C. 683, 691 (1994).

Section 6223(a) generally provides that respondent shall mail to each partner notice of the beginning of an administrative proceeding at the partnership level with respect to a partnership item, as well as notice of the final partnership administrative adjustment (FPAA) resulting from any such proceeding. It is the mailing of the FPAA that triggers the time period for a partner to object to the partnership level adjustments by filing a petition for readjustment. Sec. 6226(a). Failure by respondent to provide notice of a partnership level proceeding to a partner may result in that partner's share of the partnership items being treated as nonpartnership items. Secs. 6223(e)(2), 6231(b)(1)(D). In light of petitioners' arguments, respondent must be prepared to demonstrate compliance with the section 6223(a) notice requirements. *Crowell v. Commissioner, supra* at 691-692.

At trial, Josephine did not recall receiving an FPAA with respect to the Barrister partnership proceeding. Catherine did not testify as to whether or not she received one. However, the validity of a properly mailed FPAA is not contingent upon actual receipt by the partner of the FPAA. *Id.* at 692.

Respondent submitted certified records that show that FPAAs for the Barrister partnership for 1983 and 1984 were mailed to petitioners on September 5, 1989. We are convinced by evidence introduced by respondent that the FPAAs were properly mailed in these cases, and we so find. We find Josephine's and Catherine's self-serving testimony on this matter to be vague and insufficient to overcome respondent's evidence.

Having found that petitioners were properly notified of the partnership proceeding, we lack jurisdiction to

redetermine the deficiencies on which the additions to tax in these cases are based. *Brookes v. Commissioner*, 18 T.C. 1, 5 (1997), on appeal (9th Cir., March 25, 1997). The deficiencies are attributable to partnership items, properly considered solely in the partnership proceeding. *Saso v. Commissioner*, 93 T.C. 730, 734 (1989); *Maxwell v. Commissioner*, 87 T.C. 783, 788 (1986). Likewise, petitioners' arguments that respondent failed to comply with the applicable periods of limitation at the partnership level are affirmative defenses that could have been raised in the partnership level proceeding and may not be considered by the Court at the partner level. *Crowell v. Commissioner, supra* at 693.

The second issue for decision is whether petitioners are liable for the section 6653(a) additions to tax as determined by respondent.

Section 6653(a)(1) provides for an addition to tax equal to 5 percent of the entire underpayment of tax if any part of the underpayment is due to negligence or intentional disregard of rules and regulations. Section 6653(a)(2) provides for an addition to tax equal to 50 percent of the interest payable on the deficiency with respect to the portion of the underpayment which is attributable to negligence or intentional disregard of rules and regulations.

Negligence under section 6653 is the lack of due care or failure to do what a reasonable and ordinarily prudent person would do under the same circumstances. *Neely v. Commissioner*, 85 T.C. 934, 947 (1985). Petitioners bear the burden of proving that no part of the underpayments for the years in issue is due to negligence or intentional disregard of rules and regulations. Rule 142(a); *Matthews v. Commissioner*, 92 T.C. 351, 362 (1989),

affd. 907 F.2d 1173 (D.C. Cir. 1980); *Luman v. Commissioner,* 79 T.C. 846, 860-861 (1982).

Before dealing with the question of whether petitioners were negligent in these cases, we must address the question of whether respondent properly asserted the section 6653(a)(1) and (2) additions to tax for petitioners' 1980 taxable years.

The version of section 6653(a)(1) and (2) relied upon by respondent was enacted by section 722(b) of the Economic Recovery Tax Act of 1981 (ERTA), Pub. L. 97-34, 95 Stat. 172, 342. ERTA Section 722 (b)(2), 95 Stat. 342, provides that section 6653(a)(1) and (2) "shall apply to taxes the last date prescribed for payment of which is after December 31, 1981." The last date prescribed for the payment of taxes for petitioners' 1980 taxable years was April 15, 1981. Secs. 6072(a), 6151(a); *Jacobs v. Commissioner,* T.C. Memo. 1997-429. Therefore, section 6653(a) as in effect prior to the ERTA amendments is applicable to petitioners' 1980 taxable years.

The pre-ERTA section 6653(a) and the "new" section 6653(a)(1) have substantially identical language. Respondent's erroneous citation does not affect the validity of his determination that petitioners' underpayments of tax for 1980 were due to negligence or intentional disregard of rules and regulations. *Burrill v. Commissioner,* 93 T.C. 643, 670 n.28 (1989). However, the section 6653(a)(2) addition to tax asserted by respondent for 1980 is without any statutory authority. The addition to tax equal to 50 percent of the interest attributable to a negligent underpayment was first introduced into the Code by ERTA. Accordingly, we hold that petitioners are not liable for the section 6653(a)(2) addi-

tions to tax for 1980 as determined by respondent. *Skyrms v. Commissioner*, T.C. Memo. 1997-69.

We now turn to the question of whether petitioners' underpayments for the taxable years in issue were due to negligence or intentional disregard of rules and regulations. Petitioners contend that they did not act negligently because they relied on the advice of Mr. Santella. Under some circumstances, a taxpayer may avoid liability for negligence if reasonable reliance on a competent professional adviser is shown. *United States v. Boyle*, 469 U.S. 241 (1985); *Freytag v. Commissioner*, 89 T.C. 849, 888 (1987), affd. 904 F.2d 1011 (5th Cir. 1990), affd. 501 U.S. 868 (1991).

Based on the record, we find that petitioners have not proved that their reliance on Mr. Santella was reasonable under the circumstances. There is no evidence in the record that Mr. Santella was qualified to render a professional opinion to Josephine and/or Gus as to the business merits and tax consequences of the Barrister partnership investments.

Petitioners did not establish that Mr. Santella had any expertise in the publishing industry which he advised petitioners to invest in for alleged business reasons.[4] Although Josephine and Catherine each testified that the motivation for their investments was enhanced income flow, neither of them ever voiced any concern to Mr. Santella over the absence of any income and eventual complete loss of their $25,000 investments. We find that petitioners' investment of $25,000 in an industry that neither they nor their adviser knew anything about without even a cursory review of the offering materials was negligent.

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[4] Josephine and Catherine also admit to having no personal knowledge of the publishing industry.

We are also not convinced that Mr. Santella's advice regarding the tax consequences of the investment was competent. In their petitions to this Court, petitioners state that Mr. Santella mentioned tax benefits which might be obtained from the investment, for which he had an opinion from legal counsel. However, the tax opinion that Mr. Santella purportedly relied upon is not in the record for our consideration. No testimony was offered by petitioners from any individual, including Mr. Santella's son, the successor to the Chimblo accounts, to establish Mr. Santella's competence to render advice with respect to the tax consequences of petitioners' investments.

We conclude that petitioners were negligent because their reliance on Mr. Santella was not reasonable under the circumstances. They did not prove that he was competent to render advice concerning the business merits or tax consequences of the investments, or that he reasonably relied upon competent professional advice in rendering his own advice. Accordingly, we hold that petitioners are liable for the section 6653(a) additions to tax as determined by respondent except for the 6653(a)(2) additions to tax for 1980 discussed *supra*.

The third issue for decision is whether petitioners are liable for the section 6661 additions to tax for substantial understatements of income tax for 1983 and 1984. For purposes of this issue, all refeernces to petitioners hereinafter are to Catherine Chimblo and the estate of Gus Chimblo.

Section 6661(a) provides for an addition to tax if there is a substantial understatement of income tax for the taxable year. In the case of additions to tax assessed after October 21, 1986, the amount of the addition to tax is equal to 25 percent of the amount of any underpayment attributable to such understatement. Omnibus

Budget Reconciliation Act of 1986, Pub. L. 99-509, sec. 8002(c), 100 Stat. 1874, 1951; *Licari v. Commissioner*, 946 F.2d 690, 692 (9th Cir. 1991), affg. T.C. Memo. 1990-4; *Pallottini v. Commissioner*, 90 T.C. 498 (1988).

Section 6661(b)(1)(A) provides that a substantial understatement of income tax exists if the amount of the understatement exceeds the greater of: (1) 10 percent of the tax required to be shown on the return; or (2) $5,000. An understatement is defined as the excess of the amount of tax required to be shown on the return for the taxable year over the amount of tax imposed which is shown in the return, reduced by any rebate. Sec. 6661(b)(2)(A). In the instant case, petitioners' understatements of income tax for 1983 and 1984 are $12,387 and $12,577, respectively, and are therefore substantial. The entire amounts of the understatements are due to petitioners' disallowed losses and investment tax credits claimed with respect to the Barrister partnership.

In general, section 6661(b)(2)(B) provides that the understatement is deemed to be reduced to the extent it is attributable to: (1) The tax treatment of any item for which there was substantial authority; or (2) any item with respect to which the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return. In the case of items attributable to a tax shelter, the understatement may not be reduced by reason of disclosure, and may only be reduced by reason of substantial authority if the taxpayer reasonably believed that the tax treatment of the tax shelter item was more likely than not the proper treatment. Sec. 6661(b)(2)(C).

Petitioners do not argue that substantial authority exists for their tax treatment of the items in issue or that they adequaely disclosed the relevant facts with respect to the

Barrister partnership investment. Rather, they contend that respondent should have waived the additions to tax pursuant to section 6661(c).

Section 6661(c) authorizes respondent to waive any part of the addition to tax imposed under section 6661(a) upon a showing by the taxpayer of reasonable cause for the understatement and that the taxpayer acted in good faith. The most important factor in determining whether to grant a waiver is the extent of the taxpayer's effort to assess the taxpayer's proper tax liability under the law. *Mailman v. Commissioner,* 91 T.C. 1079, 1083-1084 (1988); sec. 1.6661-6(b), Income Tax Regs. Reliance upon the advice of a professional will not constitute reasonable cause and good faith, unless under all the circumstances, such reliance was reasonable. Sec. 1.6661-6(b), Income Tax Regs. The appropriate standard of review for denial of a waiver is whether respondent's refusal to waive the section 6661 addition to tax constitutes an abuse of discretion. *Mailman v. Commissioner, supra* at 1083-1084.

There is no evidence in the record that petitioners requested respondent to waive the section 6661 additions to tax pursuant to section 6661(c). Petitioners first raised this issue in their post-trial brief. It was not raised in their petition or their pre-trial memorandum. Under such circumstances we decline to find that respondent abused his discretion, since such discretion was never requested to be exercised. *McCoy Enterprises, Inc. v. Commissioner,* 58 F.3d 557, 563 (10th Cir. 1995), affg. T.C. Memo. 1992-693; *Reinke v. Commissioner,* 46 F.3d 760, 765 (8th Cir. 1995), affg. T.C. Memo. 1993-197; *The Escrow Connection, Inc. v. Commissioner,* T.C. Memo. 1997-17; *Selig v. Commissioner,* T.C. Memo. 1995-519; *Dugow v. Commissioner,* T.C. Memo 1993-

401, affd. without published opinion 64 F.3d 666 (9th Cir. 1995); *Magnus v. Commissioner*, T.C. Memo. 1990-596.

Even if we were to assume that such a request was made and that the evidence in this record was available to respondent, *see Reile v. Commissioner*, T.C. Memo. 1992-488; *Rogers v. Commissioner*, T.C. Memo. 1990-619, we are not persuaded that respondent's denial of a request for a waiver would constitute an abuse of discretion under the facts. As discussed *supra*, petitioners have not proved that their reliance on Mr. Santella was reasonable.[5]

We hold that petitioners are liable for the section 6661 additions to tax for 1983 and 1984 as determined by respondent.

To reflect the foregoing.

Decisions will be entered under Rule 155.

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[5] Although the stipulated decision in *Anderson Equipment Associates, et al, Barrister Associates, Tax Matters Partner v. Commissioner*, docket No. 27745-89, see *supra* note 3 and related text, does not explain the basis of the decision, we have previously found that the Barrister Equipment Associates Series 162 partnership, the partnership involved in the stipulated decision, lacked economic substance and was a sham. *Connell v. Commissioner*, T.C. Memo. 1996-349.

APPENDIX C
DENIAL OF REHEARING BY COURT OF APPEALS

[Filed Aug. 19, 1999]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the — day of August one thousand nine hundred and ninety-nine.

Dkt No.: 98-4306

CHIMBLO,
Petitioner-Appellant

v

CIR,
Respondent-Appellee

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Josephine Chimblo and Catherine Chimblo.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON
Acting Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

APPENDIX D

APLICABLE INTERNAL REVENUE CODE PROVISIONS

[Sec. 6213(a)]

(a) TIME FOR FILING PETITION AND RESTRICTION ON ASSESSMENT.—Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition

by the Secretary in the notice of deficiency shall be treated as timely filed.

[Sec. 6226(a)]

(a) PETITION BY TAX MATTERS PARTNER.—Within 90 days after the day on which a notice of a final partnership administrative adjustment is mailed to the tax matters partner, the tax matters partner may file a petition for a readjustment of the partnership items for such taxable year with—

(1) the Tax Court,

(2) the district court of the United States for the district in which the partnership's principal place of business is located, or

(3) the Claims Court.

[Sec. 6226(b)]

(b) PETITION BY PARTNER OTHER THAN TAX MATTER PARTNER.—

(1) IN GENERAL.—If the tax matters partner does not file a readjustment petition under subsection (a) with respect to any final partnership administrative adjustment, any notice partner (and any 5-percent group) may, within 60 days after the close of the 90-day period set forth in subsection (a), file a petition for a readjustment of the partnership items for the taxable year involved with any of the courts described in subsection (a).

(2) PRIORITY OF THE TAX COURT ACTION.—If more than 1 action is brought under paragraph (1) with respect to any partnership for any partnership taxable year, the first such action brought in the Tax Court shall go forward.

(3) PRIORITY OUTSIDE THE TAX COURT.—If more tran 1 action is brought under paragraph (1) with respect to any partnership for any taxable year but no such action is brought in the Tax Court, the first such action brought shall go forward.

(4) DISMISSAL OF OTHER ACTIONS.—If an action is brought under paragraph (1) in addition to the action which goes forward under paragraph (2) or (3), such action shall be dismissed.

(5) TREATMENT OF PREMATURE PETITIONS.—If—

(A) a petition for readjustment of partnership items for the taxable year involved is filed by a notice partner (or a 5-percent group) during the 90-day period described in subsection (a), and

(B) no action is brought under paragraph (1) during the 60-day period described therein with respect to such taxable year which is not dismissed,

such petition shall be treated for purposes of paragraph (1) as filed on the last day of such 60-day period.

(6) TAX MATTERS PARTNER MAY INTERVENE.—The tax matters partner may intervene in any action brought under this subsection.

[Sec. 6229(a)]

(a) GENERAL RULE.—Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of—

(1) the date on which the partnership return for such taxable year was filed, or

(2) the last day for filing such return for such year (determined without regard to extensions).

(b) EXTENSION BY AGREEMENT.—

(1) IN GENERAL.—The period described in subsection (a) (including an extension period under this subsection) may be extended—

(A) with respect to any partner, by an agreement entered into by the Secretary and such partner, and

(B) with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement),

before the expiration of such period.

(2) SPECIAL RULE WITH RESPECT TO DEBTORS IN TITLE 11 CASES.—Notwithstanding any other law or rule of law, if an agreement is entered into under paragraph (1)(B) and the agreement is signed by a person who would be the tax matters partner but for the fact that, at the time that the agreement is executed, the person is a debtor in a bankruptcy proceeding under title 11 of the United States Code, such agreement shall be binding on all partners in the partnership unless the Secretary has been notified of the bankruptcy proceeding in accordance with regulations prescribed by the Secretary.

(3) COORDINATION WITH SECTION 6501(c)(4).—Any agreement under section 6501(c)(4) shall apply with respect to the period described in subsection

(a) only if the agreement expressly provides that such agreement applies to tax attributable to partnership items.

[Sec. 6229(c)]

(c) SPECIAL RULE IN CASE OF FRAUD, ETC.—

(1) FALSE RETURN.—If any partner has, with the intent to evade tax, signed or participated directly or indirectly in the preparation of a partnership return which includes a false or fraudulent item—

(A) in the case of partners so signing or participating in the preparation of the return, any tax imposed by subtitle A which is attributable to any partnership item (or affected item) for the partnership taxable year to which the return relates may be assessed at any time, and

(B) in the case of all other partners, subsection (a) shall be applied with respect to such return by substituting "6 years" for "3 years."

(2) SUBSTANTIAL OMISSION OF INCOME.—If any partnership omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in its return, subsection (a) shall be applied by substituting "6 years" for "3 years".

(3) NO RETURN.—In the case of a failure by a partnership to file a return for any taxable year, any tax attributable to a partnership item (or affected item) arising in such year may be assessed at any time.

(4) RETURN FILED BY SECRETARY.—For purposes of this section, a return executed by the Secretary

under subsection (b) of section 6020 on behalf of the partnership shall not be treated as a return of the partnership.

[Sec. 6231(b)(3), (4), (5), and (6)]

* * * *

(3) PARTNERSHIP ITEM.—The term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.

(4) NONPARTNERSHIP ITEM.—The term "nonpartnership item" means an item is (or is treated as) not a partnership item.

(5) AFFECTED ITEM.—The term "affected item" means any item to the extent such item is affected by a partnership item.

(6) COMPUTATIONAL ADJUSTMENT.—The term "computational adjustment" means the change in the tax liability of a partner which properly reflects the treatment under this subchapter of a partnership item. All adjustments required to apply the results of a proceeding with respect to a partnership under this subchapter to an indirect partner shall be treated as computational adjustments.

[Sec. 6501(c)]

(c) EXCEPTIONS.—

(1) FALSE RETURN.—In the case of a false or fraudulent return with the intent to evade tax, the

tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) WILLFUL ATTEMPT TO EVADE TAX.—In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) NO RETURN.—In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(4) EXTENSION BY AGREEMENT.—Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

[Sec. 650(e)]

(e) SUBSTANTIAL OMISSION OF ITEMS.—Except as otherwise provided in subsection (c)—

(1) INCOME TAXES.—In the case of any tax imposed by subtitle A—

(A) GENERAL RULE.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return,

the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. For purposes of this subparagarph—

(i) In the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services; and

(ii) In determining the amount omitted from gross income, there shall not be taken into amount any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item.

(B) CONSTRUCTIVE DIVIDENDS.—If the taxpayer omits from gross income an amount properly includible therein under section 551(b) (relating to the inclusion in the gross income of United States shareholders of their distributive shares of the undistributed foreign personal holding company income), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

APPENDIX E

IRS ADMISSION OF NO TAX-MOTIVATED TRANSACTION

(P. 3-4, Petitioners' Court of Appeals Brief)

IV. THE TAX-MOTIVATION ISSUE CONCEDED BY IRS

IRS claimed in the notices of deficiency in both cases that the investments in the partnership by the taxpayers were "tax-motivated" transactions, and therefore subjected the taxpayers to penalty interest under *IRC § 6621(c).*

The taxpayers' petition to the Tax Court in both cases alleged that the investments were not tax-motivated, and therefore that it was error to impose the penalty interest. *Par. 6(d) of petition in No. 16804-96; and Par. 6(e) of petition in No. 16546-96.* The IRS answers in both cases denied those allegations. *Par. 6 of answer in No. 16804-96; and Par. 6 of answer in No. 16546-96.*

Whether the taxpayers' partnership investments were tax-motivated was a clear issue in these cases.

Thereafter, in stipulations and on trial, IRS conceded that the investments in the partnership were not tax-motivated. *Par. 10 of the stipulations* in both cases state that the underlying tax adjustments "are not substantial underpayments attributable to tax-motivated transactions." Similarly, IRS counsel stated at trial (*Tr. 4*),* when asked by the court whether IRS "concede[s] the 6621(c) or (d) issue," that "That is correct, Your Honor. Respondent concedes that in both cases."

Yet those same investments, which are admitted by IRS both by stipulation and on trial not to be tax-motivated,

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* Reference to the trial transcript will be by "Tr." and page number.

were the basis of the penalties asserted by IRS in the notice of deficiency in issue here. In determining whether it was erroneous to apply those penalties, the critical fact must be taken into account that the investments were not tax-motivated.

(2)

No. 99-815

RECEIVED
DEC 27 1999

In the Supreme Court of the United States

JOSEPHINE CHIMBLO, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the notice of deficiency determining "affected items" against petitioners was barred by the statute of limitations contained in Section 6229 of the Internal Revenue Code, 26 U.S.C. 6229.

2. Whether the negligence penalty was properly imposed under Section 6653(a) of the Internal Revenue Code, 26 U.S.C. 6653(a) (1982 & Supp. IV 1986).

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In the Supreme Court of the United States

No. 99-815

JOSEPHINE CHIMBLO, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 177 F.3d 119. The memorandum opinion of the Tax Court is unofficially reported at 74 T.C.M. (CCH) 1307 (Pet. App. 17a-28a).

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1999. The petition for rehearing was denied on August 19, 1999 (Pet. App. 29a). The petition for a writ of certiorari was filed on November 12, 1999. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1983 and 1984, petitioners invested in a partnership known as Barrister Equipment Associates Series 151 (Barrister). The "sole business [of the partnership] was printing and selling '49 different literary works and microcomputer disks aimed at a general public market, using leased films, plates and disks to produce said products'." Pet. App. 5a. On Barrister's federal partnership tax returns for 1983 and 1984, it reported significant losses and considerable amounts of qualified investment credit property. Petitioners claimed a distributive share of the ordinary loss deductions and investment tax credits on their individual federal income tax returns for 1983 and 1984, and they carried back an unused portion of the 1983 tax credit to reduce their 1980 and 1981 tax liabilities. *Ibid.*

On September 5, 1989, the Commissioner of Internal Revenue mailed to the Barrister partners, including petitioners, a notice of final partnership administrative adjustment (FPAA) determining adjustments to Barrister's 1983 and 1984 partnership returns. C.A. App. 28-31. A petition for readjustment was filed in the Tax Court on behalf of Barrister by its tax matters partner pursuant to 26 U.S.C. 6226. That case culminated in the entry of a stipulated decision on February 17, 1995, which provides (i) that none of the losses claimed by Barrister for 1983 and 1984 are allowable and (ii) that the amounts of its qualified investment credit property for 1983 and 1984 are zero. C.A. Supp. App. 93-96. In that partnership-level proceeding, Barrister did not assert that the statute of limitations barred the adjustment of its return.

As a result of the decision entered in the partnership-level proceeding, the Commissioner made "computational adjustments" to the partners' tax returns and assessed tax deficiencies against petitioners for 1980 and 1981 with respect to their erroneously asserted partnership items. See 26 U.S.C. 6225, 6230(a)(1), 6231(a)(6).

In addition, in a notice of deficiency mailed on April 29, 1996, the Commissioner determined that petitioners were liable in 1980 and 1981 for negligence penalties and substantial understatement penalties stemming from their erroneous treatment of their investments in Barrister. Penalties asserted against individuals because of their incorrect treatment of partnership items (which are themselves determined at the partnership level) are known as "affected items." See generally 26 U.S.C. 6221-6233. Petitioners petitioned to the Tax Court for a redetermination of these "affected items." [1]

2. Petitioners argued in the Tax Court that (i) the Commissioner's determination of the penalties at issue was barred by the limitations period provided at 26 U.S.C. 6229 and (ii) they had reasonably relied on the advice of their accountant with respect to their tax treatment of the Barrister partnership transactions and were therefore not subject to the negligence penalty. The Tax Court held that the Commissioner's determination of affected items was not barred by the statute of limitations and that petitioners had not shown

---

[1] Their case was consolidated in both the Tax Court and the court of appeals with a related case involving taxpayers Catherine Chimblo and the Estate of Gus Chimblo, who also challenged the Commissioner's determination of affected items against them with respect to their tax treatment of investments in the Barrister partnership. Catherine Chimblo and the Estate of Gus Chimblo have not petitioned for a writ of certiorari.

that their reliance on their accountant respecting the tax treatment of their partnership items was reasonable. Pet. App. 27a-28a.

3. The court of appeals affirmed. Pet. App. 1a-16a. The court rejected petitioners' contention that the fact that the FPAA was issued after the limitations period provided in 26 U.S.C. 6229(a) had expired required a finding that the "affected items proceeding" involving the individual partners was barred by the statute. Pet. App. 10a-11a. The court explained that Section 6229(a) creates a limitation on the period for adjusting a partnership return which creates a defense for the partnership, not for the partners, and that the failure of the partnership to raise that defense in the partnership-level proceeding barred its assertion in the "affected items proceeding" involving the individual partners.

The court of appeals also upheld the Tax Court's finding that petitioners were liable for negligence penalties. The court concluded that the Tax Court had not clearly erred in finding that the partners' asserted reliance on their accountant's advice was unreasonable. The court noted that the partnership's "too-good-to-be-true" offering was a sufficient indication that the partnership was created only to generate tax benefits. Pet. App. 12a-13a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly held that the Commissioner's notice of deficiency was not barred by limitations. The Commissioner's determination of federal taxes with respect to partnerships is governed by

provisions codified at 26 U.S.C. 6221-6233.[2] The limitations period for assessing any tax attributable to a partnership item (or an affected item for an individual partner) is generally three years after the later of (i) the date on which the partnership return is filed, or (ii) the last day for filing such return for such year. 26 U.S.C. 6229(a). If an FPAA is mailed to the tax matters partner with respect to any taxable year, however, the running of the limitations period is suspended under 26 U.S.C. 6229(d)—

> (1) for the period during which an action may be brought under section 6226 (and, if an action with respect to such administrative adjustment is brought during such period, until the decision of the court in such action becomes final), and
>
> (2) for 1 year thereafter.

In this case, the Commissioner issued an FPAA to the Barrister partners, and an action was brought in the Tax Court on their behalf under Section 6226. Under the express terms of 26 U.S.C. 6229(d), the limitations period was suspended until one year after the Tax Court decision became final. The stipulated decision of the Tax Court became final on May 18, 1995 (90 days after its entry on February 17, 1995). See 26 U.S.C. 7481(a)(1), 7483. The notice of deficiency in the "affected items" proceeding was mailed to petitioners

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[2] These provisions are known as the unified partnership audit examination and litigation provisions, which were enacted by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97- 248, § 402(a), 96 Stat. 648, effective (§ 407(a)(1), 96 Stat. 670) for partnership taxable years beginning after September 3, 1982.

on April 29, 1996, which was within the resulting limitations period for those items. Pet. App. 6a.

Petitioners contend that, because the FPAA was issued beyond the three-year period provided in 26 U.S.C. 6229(a), the limitations on the determination of affected items necessarily expired prior to the Commissioner's mailing of the notice of deficiency. That contention, however, ignores the fact that the FPAA was determined in the partnership proceeding to be valid and that a final decision upholding the FPAA was entered in that case. As the court of appeals correctly concluded (Pet. App. 12a), any affirmative statute of limitations defense that may have been available with respect to the timeliness of the FPAA was waived when it was not raised in the partnership-level proceeding. Accord, *Crowell* v. *Commissioner*, 102 T.C. 683, 693 (1994). See also *Kaplan* v. *United States*, 133 F.3d 469, 473 (7th Cir. 1998); *Thomas* v. *United States*, 967 F. Supp. 505, 506 (N.D. Ga. 1997); *Slovacek* v. *United States*, 36 Fed. Cl. 250, 254-256 (1996); *Barnes* v. *United States*, 97-2 Tax Cas. (CCH) ¶ 50,774 (M.D. Fla. 1997), aff'd, 158 F.3d 587 (11th Cir. 1998)(Table). Because the FPAA was determined to be valid in the partnership proceeding, and because the affected items were thereafter determined within the one-year period provided for that purpose in 26 U.S.C. 6229(d), the court of appeals correctly concluded (Pet. App. 11a-12a) that the notice of deficiency was timely for the affected items at issue in this case.

Petitioners err in asserting (Pet. 13) that the role given to the tax matters partner in the partnership proceeding to raise the statute of limitations defense deprives individual partners of due process of law. That contention has consistently been rejected in the courts of appeals because the statute "contemplates

that indirect partners will receive notice from [the tax matters partner or other] specified direct partners." *Walthall* v. *United States*, 131 F.3d 1289, 1294-1295 (9th Cir. 1997). See also *Transpac Drilling Venture 1983-63* v. *United States*, 16 F.3d 383, 390 (Fed. Cir.), cert. denied, 513 U.S. 819 (1994); *Brookes* v. *Commissioner*, 108 T.C. 1 (1997); *1983 Western Reserve Oil & Gas Co.* v. *Commissioner*, 95 T.C. 51, 64 (1990), aff'd without published opinion, 995 F.2d 235 (9th Cir. 1993) (Table). There is no conflict among the circuits or other reason to warrant further review of that contention in this case.

2. The court of appeals also correctly upheld the factual determination of the Tax Court that petitioners had not reasonably relied on their accountant and were liable for the negligence penalty imposed by Section 6653 of the Code. During the tax years involved in this case, Section 6653 of the Code imposed a penalty of five percent of an underpayment of tax required to be shown on a return which was found to be "due to negligence (or intentional disregard of rules or regulations)." 26 U.S.C. 6653(a) (Supp. IV 1986).[3] Negligence for this purpose is defined as the "lack of due care or [a] failure to do what a reasonable and prudent person would do under the circumstances." *Goldman* v. *Commissioner*, 39 F.3d 402, 407 (2d Cir. 1994); see *Zfass* v. *Commissioner*, 118 F.3d 184, 188 (4th Cir. 1997); *Chamberlain* v. *Commissioner*, 66 F.3d 729, 732 (5th Cir. 1995). A taxpayer's reliance on expert advice is not "rea-

[3] Section 6653 was repealed by the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7721(c)(2), 103 Stat. 2399, for tax years after 1989. Section 6662 of the Code now imposes an "accuracy-related penalty" in various situations, one of which is "[n]egligence or disregard of rules or regulations." 26 U.S.C. 6662(a), (b)(1).

sonable and prudent" for this purpose when, as the Tax Court found in this case (Pet. App. 24a-25a), the purported "expert" lacks knowledge of the business in which the taxpayer invested, and there is no evidence that the "expert" or the taxpayer independently made a reasonable investigation of the business merits of the partnership. *David* v. *Commissioner*, 43 F.3d 788, 789-790 (2d Cir. 1995); *Goldman* v. *Commissioner*, 39 F.3d at 408. Moreover, a taxpayer's purported reliance on expert advice is not reasonable when, as here, the tax benefits offered by the advised investment are "too good to be true." *David* v. *Commissioner*, 43 F.3d at 789; *Goldman* v. *Commissioner*, 39 F.3d at 407-408. The Tax Court correctly determined, under these legal standards, that petitioners did not reasonably rely on expert advice in this case.

Petitioners err in asserting (Pet. 14) that the courts below looked only at the "single fact" that their reliance on the purported expert was unreasonable. The court of appeals emphasized that the negligence of petitioners was also demonstrated by their surprising failure to "voice a concern to their advisor over the absence of any generated income and the eventual complete loss of their original $25,000 investments" and by the fact that their cash investment was substantially less than the claimed deductible losses and credits. Pet. App. 13a. As the court noted, the negligence of petitioners was further borne out by the fact that the "partnership's 'too-good-to-be-true' offering was clear indication that [the] partnership was created only to generate tax deductions." *Ibid.* Further review of these findings "concurred in by two lower courts" (*Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982)) is not warranted. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 99-815

IN THE

Supreme Court of the United States

JOSEPHINE CHIMBLO AND ESTATE OF
ANTHONY J. CHIMBLO, Deceased,
ROSALIE MONAHAN, Executrix,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

STATEMENT

This litigation was brought under Internal Revenue Code (Code) § 6213 in defense against a notice of deficiency issued by IRS to Josephine Chimblo and her husband Anthony Chimblo, two elderly disabled persons beset by life-threatening illnesses. It is not litigation against any FPAA (final partnership administrative adjustment) and does *not* involve any partnership items or any partnership computational adjustment. The items in issue, as asserted by IRS in the deficiency notice, are strictly personal, non-partnership items, based entirely on

the personal circumstances of these taxpayers, and in no way involved any FPAA. The tax appeal here is entirely from that notice of deficiency pursuant to Code § 6213.

The emphasis placed by IRS on an FPAA is a misplaced distraction. In this litigation, not against an FPAA but against a deficiency notice, a defense that the deficiency notice was not issued within the limitations period, is authorized and proper under Code § 6213. The rulings below, denying the right to assert that defense in this litigation because of some TEFRA rationale, conflicts with established practice under § 6213.

The issues raised, as a result of denying these taxpayers the right to defend against the deficiency notice by asserting the bar of the limitations period, are stated and discussed in the petition herein. They are substantial issues concerning federal tax litigation and the TEFRA system, the application of the Internal Revenue Code, and the constitutional questions involved in the discriminatory treatment of these taxpayers. The IRS brief in opposition to the petition completely ignores these issues and says nothing about them. As to the presence of these issues or anything relating to them, there is no opposition in the IRS brief and no denial by IRS.

Instead, the IRS opposition is based entirely on a new matter, a claim that the deficiency notice was timely issued. Not only is there no support for that claim either in the Tax Court or Court of Appeals opinions but, completely to the contrary, an IRS suggestion to that effect was expressly rejected by the Court of Appeals. That claim is not proper here and is erroneous. That is the only opposition made by the IRS brief to grant of this petition with respect to the limitations issues, and, as shown below, that claim has no validity.

1. The IRS Insinuation That The Deficiency Notice Was Timely Issued Was Expressly Rejected By The Court of Appeals.

IRS was unable to produce any evidence that the deficiency notice was timely issued. IRS attempted to insinuate, by parenthetical suggestions at various times, that the deficiency notice was timely issued but it never showed that to be the fact. Denial of the limitations defense in this § 6213 appeal against the deficiency notice was based entirely on the claim that these taxpayers first had to become involved and raise it in the earlier partnership TEFRA case or else were precluded from raising it in the appeal against the later deficiency notice in this § 6213 proceeding.

Thus, the Court of Appeals stated below (*Chimblo v. Commissioner*, 177 F. 3d 119 at 125):

> "Aside from suggesting, without support in the record, that the tax matters partner probably granted an extension of the limitations period pursuant to IRC § 6229(b)(1)(B), the IRS does not refute the fact that the limitations period expired prior to its sending out the FPAA notices to Barrister and to petitioners. Instead, the IRS contends that petitioners may not raise a statute of limitations defense for the first time in their affected items proceedings, having failed to raise it at the earlier partnership level proceedings."

2. The Limitations Period For Issuing The Deficiency Notice Did Expire Before The Deficiency Notice Was Issued By IRS.

In point of fact, the limitations period had expired by the time IRS issued the deficiency notice here. There was good reason why IRS never made the contrary claim directly but sought to inject it by insinuation or suggestion. The limitations period had already expired under both

Code § 6229 and Code § 6501. The analysis to the contrary at p. 4-6 of the IRS opposition brief is defective.

Under Code § 6229(a), a general limitations period of three years is provided for making assessments against a partner both with respect to partnership items and so-called "affected" items of the partner. That three-year period starts with the date on which the partnership return is filed or, if later, the last day for filing the partnership return for the partnership year. There were no extensions of the period by agreement shown or involved in this case. Then Code § 6229(d) provides for suspension of that three-year period if an FPAA is issued to the partnership during the three-year period. Code § 6229(d) expressly refers to *suspension* of "the running of the [three-year] period" to allow for court review of the FPAA, until such court action becomes final and for one year thereafter.

Unless the FPAA is issued within the three-year period, it is obvious that the "running" of the three-year period cannot be suspended. That is the plain dictionary meaning of the statutory words. If the FPAA is issued after the three-year period has already *expired*, the three-year period is no longer "running" and there cannot be any *suspension*.

That is what happened here. The FPAA was issued after the applicable three-year period had already run and there could not be any *suspension*. The three-year period had already expired. The subsequently issued deficiency notice in this case was too late and was barred.

Thus, the tax years of Josephine and her husband involved in the notice of deficiency were the calendar years 1980 and 1981, to which deductible partnership items were caried back from the partnership calendar years 1983 and 1984. The partnership returns for those two

years were filed on April 15, 1984 and April 15, 1985, respectively. The three-year limitations period under Code § 6229(a) therefore ended, with respect to items relating to those two partnership years, on April 15, 1987 and April 15, 1988, respectively. However, the notices of deficiency in this case, as to both years, were not issued until May 3, 1996, long after those dates and long after the limitations period had expired.

IRS seeks to excuse that gap by relying on the Barrister partnership appeal to the Tax Court, and claiming that the limitations period was extended under Code § 6229 (d)(1) and (2) to May 18, 1996. But for that result to occur, to have a *suspension* of the "running" of the three-year period, it was necessary for the FPAA to have been issued, for the partnership years here involved, prior to April 15, 1987 and April 15, 1988, as shown above. The record establishes, however, that the FPAA for those partnership years was not issued prior to July 6, 1989, after both those 1987 and 1988 dates, and therefore there was no *suspension* of the limitations period to 1996.

That is exactly what the Court of Appeals said in the portion of its opinion quoted above at p. 3, that "IRS does not refute the fact that the limitations period expired prior to its sending out the FPAA notices to Barrister and to petitioners." 177 F. 3d at 125.

The same result follows, that the deficiency notice was issued after the limitations period expired, if Code § 6501 were applied.

The vice in the IRS explanation of the limitations period under Code § 6229 is its disregard of the requirement that an FPAA must be issued within the three-year period before the *suspension* of Code § 6229(d) can occur. The IRS interpretation destroys the limitations period because it would enable IRS to issue the FPAA at

any time, after any number of years beyond the three-year period, and then apply the waiting periods of § 6229(d) to bootstrap itself and make its action timely. That cannot be the result under § 6229.

3. IRS Statements In Its Opposition Brief Are Irresponsible And Inaccurate.

IRS statements in its opposition brief about the statute of limitations issue are often inaccurate and irresponsible. IRS seeks to create the impression that the lower courts found the deficiency notice to have been timely issued. That is not so, either as to the Tax Court or the Court of Appeals.

Thus, as one example, the IRS brief states at p. 6, that "the court of appeals correctly concluded (Pet. App. 11a-12a) that the notice of deficiency was timely for the affected items at issue in this case." That statement is false and a total misrepresentation. The Court of Appeals never concluded or in any fashion said that the deficiency notice was timely. The IRS position on this point is pure fiction.

4. The Court of Appeals Applied A Single-Fact Standard In Deciding Whether These Taxpayers Acted Reasonably.

In order to understand the narrow single-fact approach used by the Court of Appeals and the Tax Court in deciding that Josephine and her husband Anthony acted unreasonably in investing in the Barrister partnership, it is necessary to take into account their undisputed circumstances and where consideration of them is reflected in the opinions below.

Those circumstances are summarized at p. 14 and 15 of the petition herein. Attention is specially urged to the IRS concession that the investment in the Barrister part-

nership was *not* a tax-motivated transaction by Josephine and Anthony. Petition, Appendix E.

The Tax Court opinion clearly shows no consideration of any fact, in connection with the reasonableness of their decision to make that investment, other than the fact that they relied on the advice of a trusted, experienced certified public accountant who was found by the Tax Court not to be competent or to have the expertise to give such advice. Nothing else is mentioned in the Tax Court opinion. The Court of Appeals found no clear error and therefore affirmed. (App. 12a) The Court of Appeals subscribed to the single-fact approach of the Tax Court.

Furthermore, parenthetical questions raised by the Court of Appeals, and repeated by the IRS opposition brief at p. 8, show that it acted on a belief that Josephine and Anthony invested in the partnership for tax reasons. Those questions and their implication, such as the "too-good-to-be true" remarks, were entirely improper.

At the time Josephine and Anthony were advised by the accountant to make the investment, they were uneducated, inexperienced, disabled elderly persons; they both had heart conditions; and he was dying from colon cancer. He died within months after the investment was made, as shown in the record. They were in no condition to make complaints or to press inquiries.

More importantly, the implication of the Court of Appeals that they made the investment for tax reasons is directly contrary to the IRS concession that the investment was not a tax-motivated transaction. What the Court of Appeals has done is to disregard and override an important concession by one of the litigants, made in a written stipulation between the parties and at trial, and never retracted. That is a serious breach of procedure and a violation of the taxpayers' rights.

The circumstances of Josephine and Anthony fall squarely within this Court's express exclusion in its *Boyle* case, and within Justice Brennan's reservation in his concurring opinion in that case, as explained in the petition filed herein at pp. 15-16. The approach and decision of the Court of Appeals conflicts with other federal courts, in cases cited in the petition at pp. 16-17. These are matters which should be resolved.

CONCLUSION

The petition for a writ of certiorari should be granted.

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